



SPECIAL REPORT

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ABOUT THE REPORT

This report argues that the assumed formal–informal dichotomy between justice systems in Afghanistan misdescribes the way in which most cases in the country are resolved. In fact, analysis in late 2010 of data from ongoing research and pilot projects sponsored by the United States Institute of Peace shows that most disputes have been handled by a combination of the two justice systems, with actors in each assuming different roles depending on the location and context of the dispute as well as on the parties involved, which has serious implications for many of the international programs recently created to engage the informal sector.¹ Furthermore, this report suggests that the greatest barrier to local dispute resolution in Afghanistan is the current lack of security and political stability, which has made it more difficult for those involved in either formal or informal dispute-resolution systems to interact effectively.

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AUGUST 2011

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Noah Coburn

The Politics of Dispute Resolution and Continued Instability in Afghanistan

Summary

- There are numerous sources of local conflict in Afghanistan today, but the majority cluster around a few issues: disputes over land and water rights; family disputes, particularly inheritance; and disputes over control of local positions of authority.
- Lack of capacity or resources in the formal justice systems has been blamed for the lack of effective dispute resolution. But the fact that disputes were resolved more regularly in Afghanistan before the war years, when the formal justice system had even fewer resources, indicates that other causes are involved.
- Lack of political and personal security of dispute-resolution practitioners and the increased power of local commanders, whose authority is not community-based, have undermined the traditional dispute-resolution system. At the same time, corruption and inefficiency have delegitimized the formal justice system in the eyes of many disputants.
- Afghans and foreign donors alike note that Afghanistan has both state (court-based) and nonstate (based upon a combination of customary and religious law) justice sectors, and it is often assumed that these systems solely compete with each other for dispute-resolution authority.
- USIP research shows that, contrary to assumptions, successfully resolved disputes rely on a combination of formal and informal actors. Indeed, it is common for disputes to move between formal and informal venues and to be considered by a series of local elders and, more rarely, government officials.

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Introduction

As the international community increasingly talks about transfer of governance and security responsibility to Afghans and about the sustainability of both, it is important to have an accurate understanding of disputes that drive local instability. While most local disputes in the areas researched do not have their roots in the insurgency, the instability they create and the ability of the Taliban and other government actors to manipulate the situation ultimately have a deep impact on the political and security contexts of the ongoing insurgency. A broad understanding of the disputes, that are the roots of local instability, will undoubtedly lead to a better understanding of the instability on a more national level across Afghanistan.

This report describes trends in local disputes in Afghanistan based on pilot projects and research conducted by the United States Institute of Peace (USIP) throughout Afghanistan in 2009 and 2010. It draws on qualitative and quantitative data describing ways in which communities tend to address these disputes and some of the shortcomings of these mechanisms. USIP has been working on informal justice in Afghanistan since 2002, and in 2009 began a series of pilot projects aimed at testing linkages between the formal and informal sectors. The Institute's Traditional Dispute Resolution project relied on local implementing partners to analyze and encourage linkages between the formal and informal justice sectors in thirteen districts in Helmand, Nimroz, Uruzgun, Herat, Paktya, Nangarhar, Kunduz, and Takhar provinces. These partners, which included The Liaison Office (TLO), Cooperation for Peace and Unity, and the Norwegian Refugee Council, gathered data on local disputes while testing various approaches that encouraged cooperation between the formal and informal actors. The work of these implementers focused on disputes at the village and district levels—first, attempting to understand how disputes were being resolved within the communities and then testing various ways of strengthening the linkages between the formal and informal justice sectors.²

The district-level data demonstrate the range of issues involved in local disputes and local dispute resolution. USIP's research shows that dispute resolution is currently taking place in Afghanistan using an ad hoc array of government officials, and local leaders, who often resolve low-level disputes based on community consensus. However, these community-based mechanisms have often been undermined by corrupt officials, local strongmen, and general instability. Arms and access to illicit funds from sources such as the opium trade allow strongmen to manipulate local political structures without being responsive to community needs as leaders have been in the past.

USIP researchers also conducted additional research in the provinces of Parwan and Kabul, particularly focusing within the Kabul court system on how the formal court system takes advantage of informal mechanisms. This research demonstrates the deep reliance that the formal sector continues to have on local leaders—even in the most urban parts of the country.

On a provincial level, USIP created Dispute Resolution Councils (DRCs) that bring tribal leaders and government officials together to resolve disputes in Nangarhar and Kunar. These are usually larger in scale than USIP's village and district level work and often involve multiple tribes. Cases from these provinces demonstrate some of the challenges created by local instability and tensions between local groups and the international military. They also suggest that networks of legitimate, local leaders can do much to contribute to local stability when they are relied upon to help facilitate dispute resolution.

Taken together, USIP's interrelated case studies on dispute resolution at district and provincial levels and in urban court systems paint a holistic picture of the dispute-resolution landscape in Afghanistan and help to identify broader trends. Other reports tend to focus on specific regions, which means they occasionally miss some of the significance of deeper,

countrywide trends³ or only focus on narrow issue areas, such as land disputes.⁴ Instead, the USIP work described here conceptualizes the entire spectrum of local disputes and the ways in which various types of disputes fuel each other. It does not attempt to provide a precise analysis of local conflicts in Afghanistan; rather, it points to some trends drawn from both quantitative and qualitative studies to better inform programs going forward.⁵

Sources of Local Conflict

Dispute types vary widely in Afghanistan, but a few types—including land, water, family, and criminal disputes—tend to predominate in the districts where USIP worked. Many disputes fall into more than one of these categories. For example, in one major dispute in which USIP's DRC was involved in Nangarhar, a disagreement over the inheritance of land between an uncle and a nephew led to a feud in which four family members were killed. By the time the dispute was brought to the DRC, the most salient issue had become the murder of the family members, making it simultaneously a dispute over land, inheritance, and murder.

In almost all areas where data were collected, however, land disputes were the most prevalent. In 120 cases considered by DRCs in Nangarhar and Kunar, for example, 55 percent involved land issues. The importance of land issues is found in cases brought to the courts as well, and out of 48 cases studied from the fourth district of Kabul's primary civil court, 39 involved land-related issues (81 percent). Returning refugees, local strongmen grabbing both private and government land, unclear boundary markers, and poorly maintained, conflicting records all exacerbate this situation.⁶

Dispute types also vary over time. Several of those interviewed in Qara Bagh, in Kabul Province, for example, noted that during the civil war and the Taliban periods there were significantly more disputes over criminal matters, such as robbery. Now, though, people are more concerned with civil cases, particularly those involving land and the distribution of development aid. Interestingly, several respondents argued that the decrease in criminal issues was not due to an increase in the rule of law. Instead, they said, it was because so many resources were pouring into the country that local strongmen were spending more time working on securing these funds than trying to secure resources by fighting against each other.

Certain types of disputes tend to remain more localized, while others have the tendency to spiral upward and involve an increasing number of actors, creating wider tension. Since they involve issues of honor and privacy, for example, there is great pressure to resolve family disputes within the family—particularly disputes involving marriage, divorce, or inheritance. This is true of cases involving women and marriage, and those involving inheritance, where there is an added desire to keep the dispute out of sight from government authorities, who might attempt to extract a share of the money. As a result, the director of Women's Affairs in Paktya pointed out to a TLO researcher that it had been years since the last divorce case in the formal justice system in Paktya.⁷ Thus it is not surprising that field-research data demonstrate a higher percentage of family cases being resolved at the village level versus at district or provincial levels. In cases collected by TLO among elders in Jalalabad city and the district of Bati Kot, the ratio of land to family disputes was almost 1 to 1 (45 to 41), while in cases registered by the DRC in Nangarhar and Kunar the ratio was 5 to 1 (55 percent of cases involved land, 11 percent involved family issues).

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Actors in Local Dispute Resolution

An array of mechanisms is currently being used across the country to address the range of disputes in local communities in Afghanistan. These mechanisms include *jirgas*, gatherings of elders that are used primarily in Pashtun areas and are generally formed temporarily to solve a specific

case. Each community also typically has more-permanent councils of elders, called *shuras*, which can range from local mosque shuras to district- and provincial-level shuras.⁸ In addition, a range of respected individuals, including religious and tribal leaders, may act as mediators in a given case. Mediators may also include government officials, such as the district governor or district police chief, if they happen to have local legitimacy. Finally, government bodies like the Ministry of Justice Huqooq Department (civil affairs department) can serve as mediators or as referring agents to one of the above sources of dispute-resolution authority.

Each of these mechanisms is historical, in the sense that they have long been a means for local communities to maintain their autonomy from the Afghan state whose influence generally did not extend far beyond major cities. But they are simultaneously modern in their ability to adapt to current circumstances, such as the presence of large amounts of development aid and coalition forces. In particular, dispute-resolution mechanisms do not break down neatly into formal and informal categories. Tribal elders, for example, may work with local government officials to bring NGO funds to certain communities.

In some areas the range of forums is greater than in others. For example, in urban Jalalabad, each mosque and *nahia*, or neighborhood, generally has a shura to resolve neighborhood disputes involving land or family issues. In addition, there are development shuras set up by NGOs distributing aid as well as other *tejarati* (commercial) councils. Tejarati councils of merchants were originally set up under the Soviets, but they continue to be key players in organizing commerce in urban areas and resolving disputes between businesses. Other shuras are not geographically bound and may represent a specific tribe or ethnic group. Within the formal system in Jalalabad, the police are occasionally involved in the resolution of cases that do not get brought into the court system. Even within the court system, confusion and a lack of transparency sometimes mean that it is not always clear to participants which court should be involved in the resolution of a case.

The end result of this diverse dispute-resolution landscape is that urban residents can and do “forum shop,” taking their cases into one system or another based upon the case and their personal relationships with those that sit on cases. In one sense, this means access to justice forums in Jalalabad is better than in other parts of the country. At the same time, though, this system sometimes weakens dispute-resolution mechanisms since disputants can undermine each other by seeking different venues. In some cases, such an array of mechanisms may allow disputants to approach the body they feel most comfortable with, increasing access to justice for women, who might not be as likely to approach the formal system. At the same time, however, the personal connections of disputants to influential figures, such as commanders, and their ability to bring these figures into the process can decrease the likelihood that the dispute will be resolved justly.

Informal dispute resolution often relies on bodies of elders whose collective reputations give the resolution legitimacy and create collective social pressure on the community to respect the decision. Individuals can also be respected as dispute resolvers on their own, particularly in lower-level cases and cases involving close family members. Government officials, including judges, prosecutors, members of the Huqooq Department, and district governors are also involved in the resolution of some cases. In many areas, the district governor is also a key figure in shaping the political and security conditions in an area, in turn, shaping the context in which local disputes take place. In two districts north of Kabul, district governors often sit in on district shura meetings, although their influence on these shuras varies. Many of those interviewed pointed out that one district governor was particularly weak and followed the ruling of the shura on most cases. They compared him with his predecessor who, they claimed, determined the composition of the shura and shaped its rulings. In each district, however, it was clear that the district governor was making decisions with at least some consultation with the district shura.

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Notably, judicial officials usually have significantly less influence than the district governor's office over local disputes. The situation in Injil in Herat Province is typical, where the one judge and one prosecutor have tiny, barely furnished rooms in the district governor's compound, while the district governor welcomes guests in his sprawling office. In such a setting it was clear that the majority of local concerns went first to the district governor's office, and only when he saw fit did he send them to the prosecutor next door.

Even in areas close to Kabul, where one would expect formal institutions to have more power, the judiciary has limited influence. In one district, only an hour outside of Kabul, for example, there is one prosecutor and no judge. When interviewed by a USIP researcher, the prosecutor stated that he had only dealt with one case in the past twelve months and that he wished to be transferred back to Kabul since there was no work for him at his current post.

In addition to the informal and formal venues, in much of the country the Taliban have set up a shadow government, whose rules are being observed in an increasing number of provinces. Due to the insecurity in these areas, no systematic research has been done on these courts. However, discussions with individuals living in these areas suggest that the Taliban system rarely exists in isolation from other forms of dispute resolution. As a result, district governors in insurgent areas often have contact with the Taliban justice system. Based upon informal surveys conducted by TLO, district governors were in contact with their Taliban counterparts or other members of the Taliban shadow government in three out of the five districts surveyed in Nangarhar and Paktya.⁹

Based upon anecdotal evidence from the districts in which USIP is currently working, the Taliban justice system itself primarily takes two forms: roaming judges and local elders. Often educated in or imported from Pakistan, roaming judges travel to different areas to resolve cases; the verdicts in those cases are then enforced by local Taliban commanders. Of the districts where USIP worked, it is only in Helmand where roaming judges are at the center of dispute resolution. More common appears to be the co-option of local elders by the Taliban, who essentially demand that these elders resolve certain cases using the Taliban interpretation of *shariah* (Islamic law). The Taliban then leave the elders to resolve other cases as they see fit, leaving a system that resembles the informal system in other less Taliban-influenced parts of the country.¹⁰

Strategic Choices in Resolving Cases

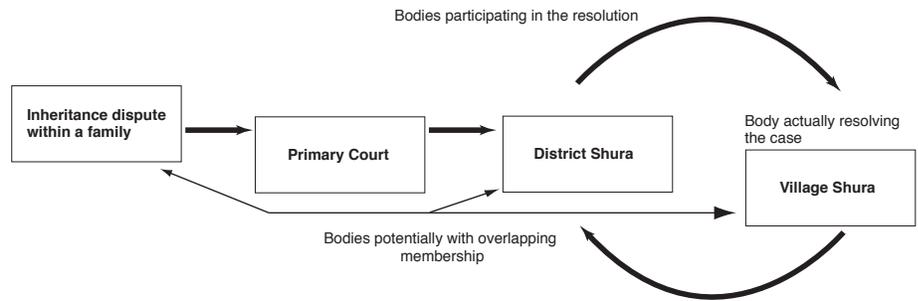
In most cases, local actors in Afghanistan are faced with a series of options about who to take their dispute to and how best to approach a resolution that favors their side. Should the dispute be kept within the family? Should the disputant first approach an elder from the family or a local religious figure? If the disputant plans to use state institutions, which of the local officials will be most likely to resolve the case effectively with a minimum paid in bribes? These are not always simple questions and the disputant must weigh the costs and benefits of their potential approaches. The disputant must also contend with significant social and political pressure from opponents and allies to approach the case in a specific manner.

Furthermore, while informants may even describe the justice system as divided between formal and informal, a deeper examination of the role different actors play in successfully resolved disputes often reveals a more complicated picture. For example, district governors and other officials frequently sit on shuras, on which they have no official capacity. But the fact that they are employed by the government ensures that others on the shura afford them more respect. Thus authority does not reside solely in the informal or formal systems.

Cases are rarely confined to one venue and routinely move between bodies. So, for example, in Qara Bagh, when two brothers fought over their inheritance from their father,

Cases are rarely confined to one venue and routinely move between bodies.

Diagram 1. Path of a Land Dispute in Qara Bagh



one of the men brought the case to the primary court in Qara Bagh. Since the dispute was primarily over land, the court investigated briefly and then referred the case to the district shura, which had local knowledge about land issues. Since the amount of land in question was not significant and since it was a family issue, the district shura referred the case to a village shura composed of four elders. Once these elders had divided the land, the resolution was then brought back to the district shura, which formally approved it (see diagram 1).

While the drawback to this approach was that the process took more than a year to resolve, the resolution to the dispute gained legitimacy and enforceability because both formal and informal bodies were included. The outcome was that both men accepted less than they had originally demanded. If the four elders on the village shura had simply resolved the dispute initially, there would have been less social pressure for all members of the community to adhere to the result. And the involvement of stronger, district-level actors who reconfirmed the resolution added more political weight to the decision than if the process had remained strictly at the village level. In this case, the movement of the case between bodies gave their resolution more legitimacy and ensured that the most knowledgeable figures about the land in question actually resolved the dispute.

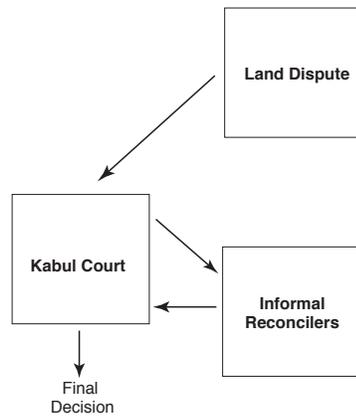
Analysis of hundreds of cases recorded by USIP partners indicates that the path a case takes is significantly influenced by the details of the case and the relationship between those involved in the dispute. However, there are some patterns in the study areas. In both Nangarhar and Paktya, for example, it is common for cases to move from the formal to the informal sides of the dispute-resolution spectrum. In Paktya, this is even true for major criminal cases, with the district governor and prosecutor both claiming that the local preference for the use of jirgas led to this practice. Other informants claimed it was because the prosecutor was overburdened and lazy.¹¹

Even within the court system, there is a significant reliance on informal mechanisms. Judges will often send cases out to groups of informal reconcilers, often related to the families of the disputants, to determine compensation. The reconcilers will reach a decision, which is then recorded and certified by the judge—in most cases, with minimal review. In one typical case in a northern suburb of Kabul, there was a dispute over land ownership after one man found another living on land that he owned. The man living on the land claimed he had purchased the land from a third man, but had been given no title. When the case went to court, the judge suggested that the men refer the case to a group of local elders. The elders decided that the man living on the property should pay the man who owned the property some 600,000 Afs, which was less than the value of the property but enough to compensate the owner. Once the decision was reached, the men brought the case back to the court and the judge stamped it (see diagram 2).

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The reconcilers will reach a decision, which is then recorded and certified by a judge.

Diagram 2. Dispute Resolved Officially by the Kabul Court



Such cases are common in the Kabul courts; over the course of four months in one primary court, for example, 11 of 27 civil cases and 7 of 23 criminal cases involved such mediation.¹² For criminal cases at the court covering the same nahias, informal intervention was most common in robbery cases, but it also occurred in more serious cases. In some cases, other informal actors, such as religious leaders, would also become involved in court proceedings as character witnesses.

In serious criminal cases, particularly murder cases, the court also distinguishes between *haq-ullah* and *haq-ulabd*, or the rights of God and the rights of the community—a distinction outlined in the Quran. The rights of the community apply to the so-called “forgivable” offenses—usually lower-level offenses, such as theft, that can be dealt with by the local community. The rights of God apply to serious offenses, such as murder, that require punishment carried out by the state.

In practice, there is some flexibility in this division even within the courts. In one case that blended both formal and informal elements, an Australian contractor was found guilty in Kabul court of murdering an Afghan colleague. After the verdict was handed down, the judge recommended that the victim’s kin and the guilty man reconcile the civil aspect of the case. Since the victim’s heirs were minors and the Australian contractor had no kin in Afghanistan, both groups used proxies. A distant relative of the victim and a couple of the Australian’s colleagues met to informally determine compensation for the victim’s family. The group determined that the contractor should pay the family 460,000 Afis, or approximately US\$100,000. Once this *haq-ulabd* aspect of the case had been addressed, the judge reduced the contractor’s sentence from death to imprisonment. Thus, while the civil and criminal, and informal and formal aspects of this case were conceptually distinct, the resolution of the civil aspect impacted the final sentence. This case also demonstrates that informal mechanisms are so flexible that they not only often enter court proceedings but even adapt to the international presence in the country.

USIP’s research across thirteen districts in Afghanistan demonstrates that communities generally choose mechanisms that will resolve disputes quickly and at the lowest level. In part, this is the result of a high number of local councils and other bodies, but it also reflects the general understanding that escalation of conflict invariably increases the cost of resolution. Of 200 cases reported by TLO in both rural and urban Nangarhar, 72 involved a village-level shura, whereas only 21 involved a district shura. Disputants consider involving the formal judicial system even more costly, and of the same 200 recorded cases in Nangarhar, only 2 involved the court system. In other districts in Kabul, informants estimated that some 70 percent of cases are resolved at the village level, while only 30 percent eventually involve the district shura.

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The choice of forum also affects the type of resolution a party can expect. Resolutions of cases brought before local elders often emphasize long-term stability and restorative justice more than individual rights. In a case in Mohmand Dara, for example, a woman was engaged to a man who died while fighting for the Afghan National Army. The family of the man wanted the woman to marry his brother instead. But, since the brother already had a wife, the woman and her family refused, threatening to retaliate with violence. The case was eventually brought before a group of local elders. These men determined that the family of the woman had to return the bride-price to the brother of the dead man. The woman's family also had to promise that she would not marry anyone in the dead man's tribe or within her own tribe. This resolution ensured that whatever political alliances were formed by the future marriage would be less likely to revive the enmity between the two groups.

At times, attempts to eliminate the potential of a return to conflict were more extreme. In several cases involving USIP's DRCs, communities acknowledged that the fear of increased bloodshed led them to involve both government officials and local elders in an attempt to make the resolution of the cases as final as possible. In the resolution of the murder involving the uncle and nephew described above, all parties signed a pact stating that anyone violating the agreement would have their homes burned down and their properties looted.

Challenges to Resolving Localized Disputes

Many have written extensively on the issues surrounding the court system in Afghanistan, often claiming that it is slow and corrupt and that its decisions are rarely enforced.¹³ The ineffectiveness of state-justice mechanisms is not isolated from other challenges to resolving local conflicts, however. Indeed, bad governance not only hurts the formal sector, but it undermines the effectiveness of informal actors as well. Corrupt officials, for example, can hinder the dispute-resolution process among community leaders by attempting to undermine decisions by informal bodies. In one case in a town north of Kabul, officials working for the municipality had taken land from an individual six years earlier. The owner of the land, with the support of local elders, went to the Huqooq Department office, where he was given a letter stating that the municipality should return the land to him. Municipal officials refused to do so. The owner went to the primary court where he was similarly successful in winning the case. But the town still refused to turn over the land, and the court had no means for enforcing its decision. Outcomes like this delegitimize the state institutions that are not complying with the law. Such outcomes also cause the informal actors that broker the agreements to lose social capital; no longer are they considered to be individuals who can successfully resolve disputes within the community.

In an ideal setting, informal mechanisms present effective alternatives to a slow and corrupt state court system—yet many Afghans complain that the informal system has also been corrupted. It is clear that the current economic and security contexts have both increased the number of disputes and made resolving them more difficult. The insurgency, uncertain economic times, and also funds from NGOs and coalition forces have promoted the types of instability that make both state and informal mechanisms less effective. Under these unstable and economically volatile conditions, it is clear that there are certain circumstances where informal mechanisms are more effective than they are in other more stable areas.

Family disputes, for example, are often resolved quickly and quietly at the local level—often by close kin. However, when family disputes involve more than one family, they are more likely to become public because the honor of both families is involved. This appears to be even more likely when families are distantly related or from different communities. A case in point is that of the aforementioned woman who did not want to marry the brother

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of her deceased fiancé. Even in such cases, in which local elders convene to resolve disputes between families, disputants and their kin still attempt to keep the matter as private as possible. In one case where a woman ran away from a tyrannical mother-in-law, a local elder from a different family described how he had been brought in to help. He spoke with each woman from behind a curtain in order to encourage them to resolve their differences. In his description of the case, he made it clear that he emphasized to each woman the importance of resolving the dispute in order to minimize the damage already done to their family's honor. In cases like this, the greater the social distance between the actors, the less likely that the dispute will be resolved locally.

Similarly, when land-related issues are involved, the number of parties in a case generally relates to the social distance between the disputants. Thus, two disputants who are closely related to each other or are from the same tribe are more likely to resolve a case among themselves or use relatives as mediators than are disputants who are not related. A comparison of land disputes in the districts of Istalif and Qara Bagh brings this point into focus. In Istalif, which is fairly ethnically homogenous and where most groups are at least distantly related to each other, land disputes are rarely brought before the district council. On the other hand, in Qara Bagh, which is larger and more ethnically diverse, it is common for the district council to consider land issues between neighbors. This also suggests that people in urban areas turn to the formal system not because it is a particularly effective means of resolving disputes but because the social distance between neighbors is likely to be much greater than it is in rural areas.

Some cases appear more likely to be resolved quickly. For example, to resolve commercial disputes, businesses often set up effective mediating bodies, such as the tejarati councils discussed above. As a result, among thirty-six local elders in Nangarhar, only one claimed to have resolved a commercial dispute. Much of this may stem from the fact that in many commercial cases the costs for both sides increase the longer a case drags on because disputes tend to lower profits. Understandably, there is pressure to reach a resolution quickly. This is opposed to blood feuds where the victim's family and the murderer's family may not want to appear weak by attempting to settle the dispute, but they also may not have the desire to continue killing.¹⁴ As these cases demonstrate, dispute-resolution mechanisms tend to be most effective when the majority in the community are invested in a quick resolution. Thus there is pressure to resolve family disputes and commercial disputes since discord may disrupt social and economic lives in the community.

In many cases, disputes have deep political implications, particularly given the fact that instability means that the political authority of both government officials and elders is often contested at a local level. This contestation then spills into the effectiveness of dispute resolution. The ability to resolve a dispute demonstrates political strength, whereas the inability to resolve a dispute can significantly damage a leader's reputation.

In a village in the Behsud district of Nangarhar, there was a significant dispute over local leadership, and an informal election was held to select the *malik* (an informal representative to the government) for the area. After the selection of one man over another, a large dispute over land arose between two of the supporters of the men—with the elder, who had lost the election, clearly exacerbating the conflict. To pave the way for a resolution to the situation, a *jirga* was formed to address the issue of leadership in the village. The land being argued over was of secondary importance, and, after the leadership issue was fully addressed, the land dispute was resolved fairly easily.

Local dispute resolution in Afghanistan has become more difficult due to the instability of the past three decades and the fact that in many areas the fighting and rapidly shifting economic conditions have eroded historical checks on power. Part of what has made local dispute resolution effective outside of state regulation is that, on a local level, Afghan

Dispute-resolution mechanisms tend to be most effective when the majority in the community are invested in a quick resolution.

leaders are historically beholden to the communities they belong to because their power derived from local consent. Leadership among almost all groups in Afghanistan tends to be hereditary, but this often is the norm and not the rule. This means that local leaders, as well as religious leaders such as mullahs, are forced to respond to community pressures and demands. They lead by cajoling, not commanding, and due to the fierce individualism found among most groups in Afghanistan, leaders tend to be *primus inter pares*, or first among equals.¹⁵ Relying on marriage alliances, with a relatively limited gap in wealth between leaders and followers, local communities were often able to keep leaders accountable with the constant threat of their replacement.

The entrance of sizable political and economic resources from external sources has altered this system in the past thirty years. Starting during the war against the Soviets, local leaders acquired guns and money that they could use to purchase support instead of relying on traditional patterns. The threat of violence and the limited provision of services meant that communities were unable to prevent and thus simply turned a blind eye to local commanders who grabbed land or favored one particular side in disputes. In the case of one commander involved in multiple case studies, people praised the fact that during the end of the Soviet period and in the early years of the Taliban he provided people in his community with security and basic services. Since then, however, his reputation has deteriorated, primarily as his close allies have been accused of grabbing land or committing other offenses against the community. The commander is still involved in the resolution of numerous disputes in the area, but his ability to resolve disputes now seems to stem more from his ability to threaten violence. The disputes may appear resolved, but the situation is clearly creating resentment in the community. Land disputes previously resolved now seem likely to reappear once the political balance of power shifts again.

Elsewhere, former roles have been refigured by the presence of new resources. In districts in the Shomali Plain, for example, a local elder known as the *mir aw* was responsible for organizing the distribution of water from various irrigations channels. In some of these communities where USIP had researchers, this model continued, but in another, a local commander seized the position of *mir aw* and during the civil war began to charge for the right to use the water (historically, only a small maintenance fee was expected). Following 2001, the commander pulled back from this blatant extortion but continued to distribute the water in ways perceived by many as inequitable. Eventually, one man complained and was killed by the commander.

Given the political and economic instability of the past thirty years, there is often an incentive for many to ensure that disputes remain unresolved. Thus, in the case of the murder described above, the dispute between the nephew and uncle's families remained unresolved initially because one of the men had moved to Iran as a refugee. Later, after he returned and was arrested, community members put pressure on officials to have the families resolve the dispute and release the man. In Afghanistan, there is a good deal of political uncertainty and a lack of consensus over who will be in power in the future on both the national and local levels. The resolution of disputes generates political capital, and, given the current political uncertainty and lack of security, such capital may be considered a valuable resource in other political struggles. In an example of this, when a new irrigation project increased the water flow into Qara Bagh, one local elder was widely regarded as the primary mediator in resolving how the new water would be supplied to various farmers. Even though most credited several others with actually securing the funds for the project, the elder who had resolved the water-sharing disputes handily won a seat when he ran for provincial council in 2009—despite the fact that he was not an incumbent. In more unstable conditions and in areas where there is more antigovernment activity, leaders are less inclined to demonstrate their influence publicly, and local elders actually work to mask

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their influence from both antigovernment forces and from the government and coalition forces, fearing reprisals from both sides.

Some of these issues are exacerbated when the international military is involved. For example, in Kunar, an elder who was a member of the DRC helped negotiate the release of several local, young men who the community claimed had been falsely detained by the international military in the area. The elder, who was respected in the area and known by some in the local U.S. military Provincial Reconstruction Team (PRT), was able to negotiate between the community and the PRT. The success of this case, however, demonstrates some of the challenges in other cases. Community members, in particular, claimed it was very difficult to access the internationals working at the PRT and felt they could only do so through the elder. Furthermore, the active Taliban presence in the area meant that everyone involved feared reprisals from antigovernment forces. The elder worked hard to ensure that few people knew about his involvement—a striking contrast with the idealized version of the informal dispute-resolution system in which the negotiator gains political capital from his fame as a conciliator.

While the reach of the coalition forces and development projects into the Afghan countryside is limited in much of the country, the resources these groups bring are still clearly important drivers of local conflict. In cases registered by the DRCs, for example, 8 percent included issues having to do with coalition forces or with the distribution of international aid. Such complaints demonstrate how excessive international funds meant to stabilize areas can create more incentives for conflict.

Conclusion: Promoting the Resolution of Local Disputes

As the examples highlighted suggest, the current issues with informal mechanisms of dispute resolution in Afghanistan have little to do with the mechanisms themselves—and a great deal to do with the current political, social, and economic contexts that are undermining them.¹⁶ As the international community has switched its approach in the country to increasingly focus on counterinsurgency, there have been attempts by coalition forces, the U.S. and British embassies, and other international organizations to engage directly with informal systems. As this report suggests, however, the elders and councils that constitute the informal sector do not need to be strengthened (and they certainly do not need training in dispute resolution—an art they are already skilled at), as much as they need to be provided secure space in which to operate. Corrupt local officials, the continued presence of commanders and other strongmen, and insurgents all erode the traditional mechanisms that resolve local disputes and provide accountable local governance. Furthermore, in some instances, the very presence of international funds and military forces further encourage disputes, as opposed to their resolution.

International efforts should instead focus on providing security and more predictable access to political and economic resources in order to promote the historical space between local elders and government officials in which disputes can be resolved. Local disputes are not generally the cause of local insurgency, but they can create instability and violence that contribute significantly to conditions that facilitate insurgency. It is important for the international community to support the formal judiciary in setting up legitimate, transparent processes in places—cities, in particular—where there is demand for such mechanisms. It also means putting more emphasis on ensuring that local leaders are appointed based upon merit and ability, as opposed to supporting local strongmen who provide short-term stability but ultimately undermine the legitimacy of the government, the international presence, and the historical relationship between elders and communities.

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An online edition of this and related reports can be found on our website (www.usip.org), together with additional information on the subject.

Notes

1. An often-cited UNDP report claims that approximately 80 percent of all disputes in Afghanistan are resolved by the informal justice system as opposed to the state justice system. This has led to a series of aid programs aimed at working with the informal system to complement those building capacity in the formal system. See *Afghanistan Human Development Report 2007: Bridging Modernity and Tradition—The Rule of Law and the Search for Justice* (Kabul: Center for Policy and Human Development [CPHD], 2007). According to an unpublished report published by TLO, in Paktya, between 5 and 10 percent of cases are being resolved by the formal system.
2. Within USIP's work with various organizations in Afghanistan on informal dispute resolution, a template was created for gathering data on certain disputes. It allowed comparison of quantitative data from certain areas. Despite this, it is important to make clear that even when serious attempts were made to standardize data-collection methods there was still significant variation based upon the way the data were collected, but more importantly, the way that disputes manifested themselves in different regions across Afghanistan. To describe this diversity, researchers also conducted follow-up research on a series of case studies from each district. The downside to this case study-oriented approach is that many of the statistics in this report should be thought of as signpost indicators, rather than precise indicators, of the types of disputes in a certain area. On the other hand, the fact that disputes were deeply shaped by their political, economic, and social contexts means that studies about local context in Afghanistan do not simply describe how small-scale disputes were resolved in a certain area; they reveal much more about the individual lived experience of the political context of each area studied, particularly in relation to justice, instability, and many of the other drivers of the insurgency.
3. Deborah Smith, *Community Based Dispute Resolution Processes in Nangarhar Province* (Kabul: Afghanistan Research and Evaluation Unit [AREU], 2009); Deborah Smith and Shelly Manalan, *Community Based Dispute Resolution Processes in Bamyan Province* (Kabul: AREU, 2009); The International Legal Foundation, "The Customary Laws of Afghanistan," 2004, www.theilf.org; Sarah Ladbury, *Helmand Justice Mapping Study*, Final Report for the Department of International Development Afghanistan (Coffey International Development Limited, July 2010); Rebecca Gang, *Community Based Dispute Resolution Processes in Balkh Province* (Kabul: AREU, 2010); Rebecca Gang, *Community Based Dispute Resolution Processes in Kabul City* (Kabul: AREU, 2011).
4. For a study on land issues, see Liz Alden Wily, *Land Rights in Crisis: Restoring Tenure Security in Afghanistan*, Issue Paper (Kabul: AREU, March 2003); for a report focusing on dispute resolution in Helmand, particularly in instances brought before Prisoner Review Shuras, see Sarah Ladbury, *Helmand Justice Mapping Study*, Final Report for the Department of International Development Afghanistan (Coffey International Development Ltd, July 2010). For specific case studies analyzing the relationship between instability and conflict, see Coburn, *Bazaar Politics: Pottery and Power in an Afghan Market Town* (Palo Alto, CA: Stanford University Press, 2011) and for a more general overview see Coburn and John Dempsey, *Informal Dispute Resolution in Afghanistan* (Washington, DC: USIP, 2010).
5. Previous work on what is sometimes referred to as informal justice systems often focuses first on the bodies that resolve disputes (often councils known as *shuras*) or more ad hoc bodies, usually referred to using the Pashtu term *jirgas*. This approach, however, tends to be overly structural and ignores the more important issues in shaping these bodies: the disputes themselves and the relationships of those involved. *Shuras*, *jirgas*, and other bodies in Afghanistan are primarily mechanisms; they exist in order to resolve disputes or address some other local concern. Furthermore, it can be argued that this focus on dispute-resolution bodies, as opposed to a focus on the disputes themselves, has led to much of the debate over terminology—which includes *informal justice*, *traditional justice*, the *nonstate sector*, or *community-based dispute resolution*. All of these terms have shortcomings (e.g., state actors are often involved in nonstate justice, the system itself is highly formalized in some places, and community-based dispute resolution often involves religious figures from outside the community). With these flaws in mind, this report tends to use the term *informal justice* with the understanding that there is no strict dichotomy between the informal and state justice sectors and that aspects the informal sector can be highly formalized.
6. While some in the development community have promoted increased work on a national land registry due to the lack of written records, it is interesting to note that in almost all areas where USIP has conducted research, even among highly illiterate communities, it is normal to find some sort of written deeds outlining ownership. The real problem concerns the standardization of these documents, something that coalition forces have complained about when multiple "owners" demanding rent have brought deeds to troops who have set up bases on private land. As a result, international groups are likely to encounter resistance to such a system by the ruling elite, many of whom have profited from the haphazard grabbing of land over the past 30 years.
7. TLO, unpublished report.
8. The definitions of these bodies vary from community to community, and other terms, such as *jalasa*, are occasionally used as well. This flexibility makes informal mechanisms more difficult to analyze but also allows them to be adapted to fit a great variety of issues.
9. TLO, unpublished report.
10. This system extends far beyond remote, Taliban-controlled areas. Rumors abound that Taliban courts are currently issuing subpoenas for land cases, and that these are being delivered in urban Kandahar city.
11. See Peyton Cooke, TLO, forthcoming.
12. For the use of informal conciliators in the Kabul court system, see Karima Tawfik and Zuhail Nesari, (Washington D.C.: USIP, Peace Brief 101).
13. See, in particular, *Integrity Watch Afghanistan, Afghan Perceptions and Experiences of Corruption: A National Survey* (2010), and Stephen Carter and Kate Clark, *Snakes and Scorpions: Justice and Stability in Afghanistan* (Kabul: Report prepared for the Office of the High Commissioner for Human Rights, 2010).
14. As a result of this, there are rumors of several high-ranking government officials who refuse to sit in the same room together because their families are involved in feuds. To acknowledge the other would damage their reputations, but they also clearly have little interest in actually fulfilling the blood debt.
15. For more on this, see chapter 2 in Thomas Barfield, *Afghanistan: A Cultural and Political History* (Princeton, NJ: Princeton University Press, 2010) or Noah Coburn, *Bazaar Politics*.
16. A similar argument can be made about the issue of women's rights in informal justice, a topic that cannot be covered here due to inadequate space. For more on how informal justice mechanisms are not the cause of discrimination against women as much as the current social context in which these mechanisms is embedded, see Coburn and Dempsey, 2010.



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